

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
-vs-	:	
Illinois Power Company d/b/a	:	
AmerenIP	:	09-0076
	:	
Reconciliation of revenues	:	
collected under hazardous material	:	
adjustment clause rider with actual	:	
and prudent associated costs.	:	

ORDER

By the Commission:

I. INTRODUCTION

On February 11, 2009, the Illinois Commerce Commission ("Commission") entered an order initiating this proceeding for the purpose of reviewing expenditures by Illinois Power Company d/b/a AmerenIP ("IP") associated with asbestos litigation. The review is conducted under IP's Hazardous Materials Adjustment Clause ("HMAC") Rider. The review covers the period beginning January 2, 2007 through December 31, 2007 (Period 1) and the period beginning January 1, 2008 through December 31, 2008 (Period 2).

In Docket No. 04-0294, the Commission approved, with modifications, the HMAC Rider under which IP would share the cost of asbestos litigation between shareholders and ratepayers. The final Order in Docket No. 04-0294 directed IP to file the HMAC Rider to be effective January 2, 2007. The HMAC Rider was established along with a trust fund with an initial balance of \$20 million (the "Fund"). The HMAC Rider allows the utility to withdraw from the Fund 90% of the amount by which its annual cash expenditures for prudently incurred HMAC costs exceed the amount collected in base rates associated with asbestos litigation expenses. In the event that the amount in base rates exceeds IP's cash expenditures for prudently incurred HMAC costs, IP shall deposit into the Fund 90% of the difference.

The HMAC Rider further provides that the Commission may initiate a proceeding to: (i) determine the prudence of annual cash expenditures for HMAC costs (as defined by the rider), (ii) reconcile the amount of prudently incurred HMAC costs for each year with the amounts withdrawn from the Fund, and (iii) determine that the amounts deposited into and withdrawn from the Fund were correct. The Commission may, after a hearing, order the amount necessary to reconcile the amounts actually deposited into

or withdrawn from the Fund with the amounts determined by the Commission to be correct or proper, to be deposited into or withdrawn from the Fund.

In addition to requiring IP to reconcile the amount of prudently incurred HMAC costs during the review period with the associated amount in base rates, and any amounts withdrawn from and deposited into the Fund as defined in the HMAC Rider, the February 11, 2009 Order also requires IP to state the standards by which it is claiming costs incurred are prudent, by reference to the HMAC Rider, the Commission's Order in Docket No. 04-0294, or to any other pertinent standard. IP is to include a schedule presenting cumulative totals of incremental costs and cumulative totals of recoveries, by customer class, to the extent such information is reasonably available.

Pursuant to due notice, hearings were held in this matter before a duly authorized Administrative Law Judge of the Commission at its offices in Springfield on June 4 and July 24, 2009. Counsel for IP and Commission Staff ("Staff") each entered an appearance. No petitions to intervene were received. At the latter hearing, IP offered the testimony of Andrew Wichmann, a Financial Specialist employed by Central Illinois Light Company d/b/a AmerenCILCO, an affiliate of IP, and Marie French, Managing Assistant General Counsel for Ameren Services Company. Staff offered the testimony of Dianna Hathhorn, an Accountant in the Accounting Department of the Financial Analysis Division of the Commission's Bureau of Public Utilities. At the conclusion of the July 24, 2009 hearing, the record was marked "Heard and Taken." There are no contested issues.

II. IP POSITION

IP witness Wichmann testifies that the HMAC costs for 2007 (Period 1) and 2008 (Period 2) were \$510,659.44 and \$536,398.72, respectively, and that the costs meet the definition of HMAC costs as described in the HMAC Rider. Mr. Wichmann states that as of December 31, 2008, there have been no withdrawals from the Fund; he also explains why the BASE amount, as defined in the rider, for 2004 is zero. The rates in effect for 2007 were based upon the rate filing in Docket Nos. 06-0070 through 06-0072 (Cons.) that had a December 31, 2004 test year. He indicates that IP had not included any asbestos or HMAC-related settlement claims or asbestos or HMAC-related defense costs in the 2004 test year. The final rate Order excluded all asbestos or HMAC-related costs. Hence, he continues, the rates in effect for January 1, 2008 through September 30, 2008, because they were based upon rates approved in Docket Nos. 06-0070 through 06-0072 (Cons.), have a BASE amount of zero.

He states further that rates in effect for October 1, 2008 through December 31, 2008 were based upon the rate case filing in Docket Nos. 07-0585 through 07-0590 (Cons.) that had a 2006 test year. The cash claims paid for the test period was based upon a four-year average of 2002, 2003, 2004, and 2006. The average cash claims paid amount is \$311,917.00. The test year expenses for claims defense of \$522,522.63 was based upon the 2006 test year. Therefore, Mr. Wichmann concludes that the annual BASE amount for purpose of this docket is \$834,439.63 (for Period 2).

Mr. Wichmann also sponsored Ameren Exhibit 1.3 which is the response to a data request from the current rate proceedings, identifying the BASE amount for the test year in consolidated Docket Nos. 09-0306 through 09-0311.

IP witness French describes the standards by which IP claims the HMAC costs are prudent. She explains that the HMAC costs incurred in 2007 and 2008 are in the form of settlement costs and legal expenses which fall within the definition of HMAC costs as defined in the HMAC Rider. These claims are personal injury or wrongful death claims involving allegations of exposure to asbestos or materials containing asbestos and asbestos-related activities, in connection with or at facilities owned or once owned by IP. The facilities in question generally are power plants although occasionally allegations arise of exposures from working in and around the distribution system as well. The costs arise from or relate to IP's ownership or operation of facilities prior to October 1, 1999 (and prior to Ameren Corporation's acquisition of IP in 2004), and is legally obligated to pay after December 31, 2006. Ms. French testifies that none of the HMAC costs at issue fall into the categories of non-recovery, such as events giving rise to the incurrence resulting from the failure to exercise ordinary care to ensure compliance with the Permissible Exposure Limits. Also, none of the costs include salaries or benefits of IP employees, or any other non-recoverable category of costs as listed in the HMAC Rider.

Ms. French described generally the process by which IP decides upon a settlement amount. She relates that IP has retained two highly qualified defense firms to represent its interests in these matters: Hepler Broom LLC ("Hepler") and Williams, Venker, & Sanders LLC ("Williams"). Ms. French states that these firms are highly regarded and well known for providing sound legal advice in matters involving asbestos litigation. She adds that they are intimately familiar with the jurisdictions in which they practice, the court systems, jury awards, the inclinations of the costs and reputations of plaintiffs' counsel that may have bearing on litigated outcomes, among many other considerations that weigh on the recommendations they provide. As part of the process in deciding on where to settle, and how much, or whether to litigate a claim, IP relies on Hepler's and Williams' judgments and recommendations, as well as its own internal expertise. In her capacity Ms. French has reviewed and recommended hundreds of settlements, including the subject claims, and states the final, approved settlements are reasonable and consistent with the legal industry standards. The recommendations of counsel and IP's personal knowledge and expertise in such matters form the basis upon which to decide on a settlement and its value.

Ms. French explains further that other considerations taken into account include the facts supporting the allegations of exposure; the plaintiff's age and work history; the amount of time of exposure at IP facilities as compared to the overall years of exposure; the time-frame of exposure; the nature and extent of the claimants' medical condition; other contributing causes to the medical condition; IP's corporate history with respect to asbestos identification, remediation, and safe work practices in this regard; verdict potential including lost wages, medical bills, and pain and suffering; probability of an

adverse verdict; total likely settlement amount; share allocation based on other claimed exposures; dose, duration and intensity of exposure; type of products exposed to at IP facilities; type of asbestos used in the products; impact of Lipke (that if IP is the lone defendant, proof of other exposures won't come into evidence); impact on future settlements; and joint and several verdicts with set-offs where the amount of the credit is unknown. IP considers the standard by which a settlement and the amount to be dependent upon the prevailing facts and circumstances, the recommendations of outside counsel, the range of exposure--all of which leads to a reasonable and prudent decision, she contends.

Regarding the reasonableness of the fees of Hepler and Williams, Ms. French testifies that she is familiar with the fees and costs charged by defense lawyers in the IP service area. She claims that the firms charge fees in the range charged by other firms in the area, for the same kind of work. IP also reviews the bills from Hepler and Williams to ensure accuracy with respect to the work being performed and properly calculated.

IP reports that it also conducted a thorough review of historical documents to identify its own primary insurance carriers that may have any obligation to IP for these matters as well a search for any third-party insurance carriers that may owe IP defense or indemnity. All carriers identified to date have been placed on notice of the losses.

In her testimony, Ms. French notes that the Commission defines prudence as:

[...] that standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made. In determining whether or not a judgment was prudently made, only those facts available at the time the judgment was exercised can be considered. Hindsight review is impermissible.

Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent'. (Commission v Commonwealth Edison Company, Docket No. 84-0395, Order dated October 7, 1987, page 17).

Based on her familiarity and understanding of the standards by which IP assessed the prudence and justification of incurring the various settlement costs and legal expenses, it is Ms. French's opinion that IP acted prudently.

III. STAFF POSITION

Staff witness Hathhorn reports on the results of her review of IP's HMAC reconciliation for Periods 1 and 2. She concludes that \$459,593.50 is owed to IP from the Fund for 2007 activity; and IP owes the Fund \$268,236.82 for 2008 activity. Using

the Commission's criteria for prudence, Ms. Hathhorn finds no reason to dispute IP's assertion that all HMAC costs were prudently incurred during Periods 1 and 2.

In addition to her conclusion that IP has been prudent, Ms. Hathhorn recommends the following:

- a) The Commission adopt Staff's proposed HMAC reconciliations as shown on ICC Staff Exhibit 1.0 and Schedule 1.1, which depicts the reconciliation described above.
- b) The Commission order IP to submit documentation of both transfers of funds to the Commission's Manager of Accounting, within 60 days of entry of the Order in this proceeding. Correspondence identified as ICC Staff Exhibit 1.0 Attachment B already reflects sufficient documentation of the request to transfer from the Fund to IP, for the 2007 reconciliation.
- c) IP makes clear in the record of its pending rate case proceedings what amount it is requesting in base rates (i.e., what is its new proposed factor BASE for purpose of the HMAC Rider), as shown in AmerenIP Exhibit 1.3.
- d) IP analyzes the year-end activity by March 15th of each year in order to execute the transfers in or out of the Fund by April 15th of each year.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the record herein, is of the opinion and finds that:

- (1) the Commission has jurisdiction over IP and of the subject matter of this proceeding;
- (2) the statements of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (3) the evidence shows that during Period 1 and Period 2, IP acted reasonably and prudently when it incurred its HMAC costs;
- (4) IP should submit documentation of both transfers of funds to the Commission's Manager of Accounting within 60 days of the entry of this Order;
- (5) the Commission should adopt Staff's proposed HMAC reconciliation attached hereto as an Appendix;
- (6) IP should make it clear in its pending rate case proceedings what amount it is requesting in base rates concerning asbestos litigation;

- (7) IP should analyze the year-end activity by March 15th of each year in order to execute the transfers in or out of the Fund by April 15th of each year
- (8) IP has indicated on the record that it is in agreement with Staff's recommendations set forth in the prefatory portion of this Order; and
- (9) all motions, petitions, objections, or other matters in this proceeding that remain unresolved should be resolved consistent with the conclusions contained herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the reconciliation submitted by Illinois Power Company d/b/a AmerenIP as reflected in the attached Appendix is appropriate and hereby approved.

IT IS FURTHER ORDERED that Illinois Power Company d/b/a AmerenIP shall comply with Findings (4), (6), and (7).

IT IS FURTHER ORDERED that all motions, petitions, objections, or other matters in this proceeding that remain unresolved are hereby resolved consistent with the conclusions contained herein

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 10th day of September, 2009.

(SIGNED) CHARLES E. BOX

Chairman